A

VINCENT MARCOS v. PP

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
M GUNALAN JCA
B [CRIMINAL APPEAL NO: Q-06A(M)-21-08]
10 SEPTEMBER 2025

Abstract – *Expert opinion evidence on a matter that falls within the common experience and knowledge of the trial judge is inadmissible or, if admitted, should be given no weight, as it risks usurping the judge's function to determine the ultimate issue of fact from the proved circumstances of the case.*

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D ***CRIMINAL LAW:*** *Offence – Murder – Accused charged with murder of infant son – Whether prosecution proved appellant caused death of deceased – Whether intention to murder established – Whether prima facie case established – Whether trial judge erred in accepting eyewitness testimony over expert opinion – Penal Code, s. 302*

E ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against sentence and conviction – Accused charged with murder of infant son – Accused found guilty and sentenced to death – Whether prosecution proved appellant caused death of deceased – Whether intention to murder established – Whether prima facie case established – Whether trial judge erred in accepting eyewitness testimony over expert opinion – Penal Code, s. 302*

F

EVIDENCE: *Expert evidence – Opinion evidence – Admissibility – Accused charged with murder of infant son – Accused found guilty and sentenced to death – Pathologist's opinion on proximate cause of injury – Whether expert opinion admissible – Whether trial judge erred in accepting eyewitness testimony over expert opinion – Evidence Act 1950, s. 45(1)*

G

EVIDENCE: *Eyewitness – Credibility – Accused charged with murder of infant son – Accused found guilty and sentenced to death – Assessment and weight to be attached to eyewitness testimony – Whether trial judge erred in accepting eyewitness testimony over expert opinion – Evidence Act 1950, s. 45(1)*

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The appellant was charged with the murder of his two-month-old infant son ('deceased'), under s. 302 of the Penal Code ('PC'). The prosecution's case was that on the said night, following a quarrel with his wife ('PW18') at their home, the appellant, who had consumed alcohol and harboured persistent suspicions that his wife was unfaithful and that the deceased was not his biological son, violently slammed the deceased into a three-seater sofa, causing fatal head injuries. The deceased became motionless shortly thereafter and was left unattended on the sofa until the following morning

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when he was brought to the hospital and pronounced dead. During trial: (i) the pathologist ('PW6') testified that the cause of death was severe head injury due to blunt surface trauma, consistent with the deceased's head being thrown or slung onto a blunt object or surface. However, during cross-examination, PW6 opined that it was unlikely that the impact with a soft sofa cushion would cause such severe injuries unless the head struck a hard component such as the armrest or bounced onto the floor; (ii) PW18, the deceased's mother and sole eyewitness, testified that the appellant had threatened to smash the deceased's head against the wall until it bled, held the deceased upside down by his legs and then violently slammed him into the sofa cushion with such force that she heard a loud impact sound. The deceased became motionless shortly after. Her testimony was corroborated by the neighbours, PW7 and PW14, who heard loud quarrelling, the appellant counting '1, 2', and PW18 crying out 'Anang' (don't) and 'Udah agik' (enough), followed by a child's cry; and (iii) a Government psychiatrist ('PW3') testified that the appellant suffered from paranoid personality disorder, characterised by pervasive distrust and suspiciousness, including unjustified doubts about his spouse's fidelity, which could influence him to act violently against persons close to him. The trial judge, satisfied that the prosecution had established a *prima facie* case, called upon the appellant to enter his defence. In his defence, the appellant denied the violent act, claiming his wife had a 'strong imagination' and suggesting that she may have caused the injuries. The trial judge rejected the defence as a bare denial and rejected PW6's expert opinion and accepted PW18's direct eyewitness account that the deceased became motionless immediately after being slammed into the sofa. The appellant was convicted as per the charge and sentenced to death. Hence, the present appeal. The appellant contended, *inter alia*, that (i) the trial judge erred in: (a) finding that he caused the death of the deceased, as PW6's opinion, that the impact with the sofa cushion was unlikely to cause the fatal injuries, contradicted PW18's account; (b) failing to specify which limb of s. 300 of the PC was satisfied and did not prove the element of intention to kill; and (c) failing to consider that PW18 also had custody of the deceased and could have inflicted the injuries; and (ii) PW18's testimony contained contradictions and should not have been accepted.

Held (dismissing appeal)
Per Supang Lian JCA delivering the judgment of the court:

(1) PW6's opinion that the impact of slamming or throwing or smashing the deceased, a child of tender age of two months, into the cushion of the three-seater sofa, was unlikely to have caused the severe head injuries sustained by the deceased, was inadmissible and irrelevant as this was a matter within the common experience and knowledge of the trial judge. The opinion evidence of an expert is only admissible on a matter calling for expertise. The court could not accept opinion evidence unless there was a relevant issue before the court which was beyond the court's

A competence wherein the court may accept an expert opinion under s. 45(1) of the Evidence Act 1950. The proximate cause of injury was not a question of science but was a fact to be determined by the trial judge from his common experience and knowledge and surrounding circumstances. (paras 60, 61 & 67)

B **(2)** The issues of whether the act of the appellant, in slamming or smashing the deceased, a tender and fragile two-month-old baby, into the cushion of the three-seater sofa, had caused the fatal head injury, was an eminent matter and an ultimate issue that the trial court had to determine. To allow PW6's express opinion in this ultimate issue would be usurping C the function of the trial judge to draw his own inferences on the issue from the facts of the case. Witnesses are called to testify, not to decide the case. (paras 69 & 70)

(3) PW6's opinion was predicated on his assumption of the existence of the fact that the cushion of the three-seater sofa was a soft surface. No weight D should be attached to the opinion of PW6 because his opinion was speculative and a matter of conjecture. The facts upon which an expert's opinion is based must be proved by admissible evidence. There was no evidence led of a physical inspection of the sofa and its cushion and frame leading to a finding that the sofa cushion was a soft surface. PW6's E opinion evidence on this issue was of no probative value. (paras 76 & 78)

(4) As PW6's opinion evidence was inadmissible and of no probative value and, in any event, rejected by the trial judge, the appellant had not raised a reasonable doubt in the case for the prosecution that the child had died F in the manner described by PW18, which was, at the hands of the appellant. The trial judge correctly found that the appellant caused the death of the deceased based on: (i) PW18's credible and consistent eyewitness testimony that the appellant violently slammed the deceased into the sofa with such force that a loud impact sound was heard; G (ii) corroboration by the neighbours, *ie*, PW7 and PW14, who heard the quarrel, the appellant's threats and PW18's pleas; (iii) PW6's evidence that the severe head injuries corresponded with violent trauma and that the deceased would have lost consciousness and died shortly after; (iv) post-mortem ant bites indicating the body was left unattended for H hours, consistent with PW18's account; and (v) the appellant's paranoid personality disorder and jealousy-driven motive. (paras 86-96)

(5) The appellant's argument that there was no finding by the trial judge on which limb or paragraph of s. 300 of the PC was the offence committed, was flawed. This was because, ingredient (iv), as set out at para. [102] I *ante* of the judgment, as identified by the trial judge, was in reality the element or circumstance or condition prescribed in s. 300(a) of the PC. The trial judge may have used the phraseology 'and had the intention to

kill him' but this was synonymous or had the same meaning with the words 'with the intention of causing death', as used in s. 300(a) of the PC. The trial judge had made a finding of fact at the *prima facie* stage that the appellant, by his words and conduct in first holding the deceased behind him upside down by his legs and uttering threats to smash him against the wall until his head was crushed and bleeding and then proceeding to slam the deceased into the three-seater sofa violently and without mercy, knowing that the deceased, being two months old and still fragile and tender, would definitely be harmed by any violent force, clearly had the intention to kill the deceased. In other words, to cause his death. The evidence was clear that the death of the deceased resulted as intended. (paras 104, 109 & 110)

(6) Although motive was not a necessary ingredient to prove murder, but if shown, it tends to support the case against the accused so charged. The trial judge had not erred in drawing the inference that the motive for the accused to kill the deceased was out of jealousy emanating from recurrent suspiciousness regarding the fidelity of his spouse, augmented by his suspicion that the deceased was a product of that purported illicit affair. The proof of such motive in the instant case supported the case against the appellant that he inflicted the fatal injuries. PW3's psychiatric evidence that this disorder could influence the appellant to act violently against persons close to him supported PW18's account. (paras 91-93)

(7) The appellant's argument that the trial judge failed to appreciate the implication of the appellant and PW18 having jointly cared for the deceased before his death was bereft of reason or merit. It was never the appellant's case that he had seen PW18 inflicting harm or injury upon the deceased between the time he arrived home, at about 6pm or 6.30pm, on the day in question until the time that he claimed he went to sleep, which was at 10pm. Based on the appellant's own testimony, the deceased was still alive when he returned home as he saw PW18 feeding the deceased milk. The appellant even picked the deceased up and put him down again on the sofa as he looked sleepy. Thus, the appellant confirmed the evidence of PW18 that the deceased was still alive when the appellant returned home from work that evening. The time of death of the deceased was less than 24 hours before his arrival at the hospital. Crucially, PW6 testified that the deceased would have lost consciousness immediately after the trauma of sustaining the severe head injuries and died moments later. If the fatal head injuries were inflicted by PW18 before the appellant returned home from work that day, as he had claimed, the deceased would not have still been alive and being fed milk when the appellant arrived home at about 6.30pm. Further, the deceased would have either been unconscious or dead when

A the appellant purportedly picked him up from the sofa and put him down again. The improbable scenario underscored the fallacy of the appellant's case that the fatal head injuries were inflicted by PW18 under her watch and before the appellant returned home that evening. (paras 122 & 123)

B **(8)** The appellant asserted that the fatal head injuries must have been inflicted by PW18 because (i) she had mental illness; (ii) she gave inconsistent and contradictory statements; and (iii) the deceased was in her care and under her watch for most of the days. The trial judge was correct in finding that the defence of the appellant was a mere bare C denial of the incident. The assertions were not credible and insufficient to raise a reasonable doubt in PW18's narrative that the appellant had intentionally caused the death of the deceased. The appellant's conviction and sentence of death, as pronounced by the High Court, were affirmed. (paras 137 & 139)

D **Case(s) referred to:**

Abd Latif Sakimin v. PP [2009] MLJU 1828 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***
E *Chou Kooi Pang & Anor v. PP [1998] 3 SLR(R) 205* ***(refd)***
Cook v. S 24 N J Law 843 ***(refd)***
Davie v. Edinburgh Magistrates, 1953 SC 34 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Haynes v. Doman [1899] 2 Ch 13 ***(refd)***
Jayaraman & Ors v. PP [1981] CLJU 129; [1981] 1 LNS 129 ***(refd)***
F *Lim Ting Hong v. PP [1966] CLJU 90; [1966] 1 LNS 90 HC* ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Milwaukee & St Paul Railway Company v. Kellogg, [1879] 94 US 469 ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Mohd Ya'cob Demyati v. PP [2011] 4 CLJ 758 CA ***(refd)***
Ong Chan Tow v. R [1963] CLJU 88; [1963] 1 LNS 88 HC ***(refd)***
G *Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] CLJU 118; [1967] 1 LNS 118 FC* ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
H *Pubalan Peremal v. PP [2020] 8 CLJ 306 FC* ***(refd)***
R v. Abbott [1955] 2 QB 497 ***(refd)***
R v. Hipson [1968] 112 SJ 945 ***(refd)***
R v. Lanfear [1968] 2 QB 77 ***(refd)***
R v. Turner [1975] 1 All ER 70 ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
I *Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC* ***(refd)***

Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] CLJU 159; [1976] 1 LNS 159 FC ***(refd)***
Untung v. PP [2023] CLJU 1168; [2023] 1 LNS 1168 CA ***(refd)***
Zulkiple Mohamad v. PP [2022] 1 CLJ 673 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 332(1), (2)
Evidence Act 1950, s. 45(1)
Penal Code, ss. 299, 300(a), (b), (c), (d), 302

Other source(s) referred to:
Adriane Keane, The Modern Law of Evidence, 2nd edn, p 371
Phipson on Evidence, 19th edn, para 33-12, p 1180
SC Sarkar*, Sarkar, Law of Evidence, In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore,* Malaysia, edn, Vol 1, ss 1 to 55, pp 1456 to 1457

For the prosecution - Eyu Ghim Siang; DPP
For the appellant (accused) - Stephen Augustine Lateng; M/s Hani Iryani Ling & Lateng Advocs

[Editor's note: Appeal from High Court, Bintulu; Criminal Trial No: BTU-46B-1-12-2016 (affirmed).]

Reported by Lina E

JUDGMENT

Supang Lian JCA:

Introduction

[1] On the morning of 29 April 2016, a child of the tender age of two months was brought by his parents to Hospital Bintulu in Bintulu, Sarawak for medical treatment. Having observed that the child was pale and his body was motionless, the medical assistant, Bourniface anak Louison (PW1), who attended to the child, referred the latter to the Red Zone. The medical officer-in-charge at that time, Dr Wong Chee Seng (PW2) found the child to be not breathing, his body cold with a pale face and with no pulse. After a physical examination of the child, Dr Wong found rashes over his head, neck, both shoulders, both upper and lower limbs, deformity of the left thigh and stiffness of both hips and knees. Thereupon, Dr Wong pronounced the child dead not exceeding 24 hours before reaching the hospital.

[2] The father of the child, Vincent anak Marcos, the appellant, was charged with the murder of the child, Yohanes anak Vincent, for that was his name, under s. 302 of the Penal Code. Following trial at the High Court where 19 prosecution witnesses testified and the appellant was the only witness called for the defence, the appellant was convicted as charged and sentenced to mandatory death. The appeal of the father to the Court of Appeal against conviction and sentence was heard and unanimously dismissed. The reasons for that decision are these.

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The Charge

[3] The charge against the appellant reads:

> That you, Vincent anak Marcos (KPT: 861128-52-5741) on 28 April 2016 at about 7.00pm until 10.00 pm at the house No. 4B, Blok H7, Quarters UPM Bintulu Campus, 97000 Bintulu, in the district of Bintulu, in the State of Sarawak, did commit murder of a baby boy age 2 months old, Yohanes anak Vincent (KP: 160215-13-0391/SK 767731), and you thereby committed an offence punishable under section 302 of the Penal Code.

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Case For The Prosecution

[4] The prosecution's case is obtained from the appeal record, the findings of fact in the grounds of judgment of the High Court ("GOJ") and the submissions of counsel.

[5] After the marriage of the appellant, Vincent anak Marcos (DW1), to Olivia anak Pati (PW18), their baby boy, Yohanes (the deceased), was born to them on 15 February 2016. Things were normal in the early days of their marriage until after the appellant's ex-wife visited them. A week after that visit, the appellant's behaviour changed. He started to lock the entrance door of the house using two padlocks even though his wife, Olivia (PW18), was inside the house. This was because he was worried that his ex-wife would come back to visit again and take away their disabled child who was in his custody. The behaviour and attitude of the appellant remained the same even after the birth of Yohanes.

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[6] At the same time, the appellant alleged that PW18 had an extra-marital affair with another man behind his back. This led to the relationship between the appellant and PW18 turning sour as they were constantly quarrelling regarding this matter whenever they were at home.

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[7] The appellant also alleged that the baby boy was not his biological son as he suspected that the deceased was born out of a relationship between PW18 with another man. He persisted in accusing PW18 of infidelity causing them to quarrel frequently until the appellant prohibited PW18 from getting close to Yohanes when he came home from work.

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[8] PW18 felt helpless and was compelled to obey the rules laid down by the appellant as she feared that the appellant might turn violent if she did not comply.

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[9] Around March 2016, after the appellant had gone to work, PW18 realised that Yohanes' foot was swollen. She then recalled that the day before, when the appellant came back from the office, she as usual, could not stay close to the baby. At the material time, she was in the bathroom, handwashing some clothes when suddenly, she heard the voice and sound of a person hitting something. Not long afterwards, the baby was crying. PW18

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then came out of the bathroom and saw that the baby was with the appellant. When she asked the appellant as to why he hit the baby, he did not answer and returned back to work. At that moment, she suspected that the appellant had done something wrong to the baby that had caused his left foot to swell.

[10] Later, when the appellant came back from work, PW18 noted that the appellant had brought back a cloth bandage which he used to bandage the left foot of the baby before sealing it with sellotape. PW18 dared not ask the appellant why he did that. She asked the appellant to take the baby to a clinic, but he refused.

[11] A few days later, the appellant told PW18 that he wanted to bring the baby to meet a 'bomoh' by the name of Lekik anak Genang (PW16). The latter testified that the appellant and PW18 visited her twice. On their first visit, PW16 could not complete the treatment as the appellant immediately took away the baby after she had opened the bandage covering the baby's foot. The second time, PW16 made a "tangkal" using a black cloth that the appellant had brought which she attached to the baby's body. She also applied some oil to the body of the baby. However, there was no improvement to the injury of the baby's left foot after treatment by PW16.

[12] On the night of 15 April 2016, the appellant and PW18 took the baby to a clinic for an immunity injection as he had turned two months old. Dr Masniah (PW15) confirmed that she attended to the baby and gave him the injection. However, she did not conduct any physical examination of the baby.

[13] On the fateful day of 28 April 2016 at about 6.30pm, the appellant had returned home from work as usual. He then straightaway sat down on a three-seater sofa, described as the "sofa chair" by the learned trial judge, next to where the baby was sleeping. PW18 approached the appellant to ask him to send the baby to the clinic for treatment as he was unwell and of late had not been taking milk well. Before she had finished speaking, the appellant told her to shut up and to stay away from him. PW18 could smell alcohol when the appellant spoke.

[14] Thereupon, they began to quarrel again. The appellant accused PW18 of having an affair and would not believe her explanations. Being hurt and disappointed by his accusation of infidelity, PW18 started to cry out loud and screaming. This caused her stepson, who was seated next to the appellant, to cry. Then the appellant scolded PW18 and said to her, "Kau jangan nak terjerit-jerit kalau kau tak nak tengok anak kau ini aku hentak kat dinding biar berkecai kepala keluar darah!" (see PW18's witness statement, para. 15, p. 142, record of appeal (vol. 2a). His words meant that the appellant threatened to smash the baby's head against the wall until he bled. At that moment, the appellant stood up, took hold of the baby by his legs and lifted him with his head dangling behind the appellant as if he was poised

to slam the baby's head against the wall. PW18 screamed and cried out loud whilst begging him not to do so. The appellant then put the baby down on the sofa chair and sat down.

[15] PW18 ran to her room and continued to cry and screamed out loud. This caused the appellant to become angrier and telling her in a rough manner not to scream and counting one, two. She came out of her room and the appellant said to her roughly, "Kau tengok ni, kalau kau tak nak tengok dia mati". (See PW18's witness statement, para. 17, p. 142, record of appeal (vol. 2a). Whilst speaking these words, the appellant stood up again, took the baby by the legs and lifted him upside down with his head dangling down. Upon seeing this, PW18 stopped crying, afraid that the appellant might carry out his threat. However, that did not stop the appellant for he straightaway, smashed ("menghempaskan") the baby into the three-seater sofa with no mercy. The appellant then sat beside the baby and held him. He also blew into the baby's mouth a few times in an attempt to resuscitate him.

[16] At that moment, PW18 saw that the baby was still moving. The appellant lifted him and gave him to PW18. By that time, the baby had become motionless. PW18 then urged the appellant to send the baby to the hospital that same evening. He did not say anything and stayed calm as if nothing had happened.

[17] The appellant then put the baby back on the sofa chair and ate his dinner. At about 9pm, after his dinner, the appellant took out the mattress from their bedroom, and they slept in the living room that night. The appellant would not let PW18 take the baby down onto the mattress and he was left on the sofa chair without any care and attention. Whenever PW18 wanted to check on the baby throughout the night, the appellant would put his leg across her to stop her from getting up.

[18] At around 7am the next day, PW18 woke up and saw that the body of the baby was swarmed by numerous ants. The appellant then bathed the baby who remained motionless. After that, the appellant and PW18 brought him to Hospital Bintulu. As described earlier, PW2 attended to the baby, but found him to be dead.

[19] The post-mortem examination of the body of the deceased was performed by a Government Forensics Consultant, Dato' Dr Zahari Noor (PW6), on 3 May 2016 at the same hospital. PW6 determined that the body was of a two-month-old baby boy of Iban race and that the cause of death was from severe head injury due to blunt surface trauma.

[20] Following from an application by the defence, the High Court ordered the appellant to be referred to a Government psychiatrist, Dr Ismail Drahman (PW3) for mental observation. PW3, testified that the appellant had a personality disorder called "paranoid personality" that led him to harbour pervasive distrust and suspiciousness of others such that their

motives are interpreted as malevolent. A person with this disorder can have enduring suspiciousness without sufficient basis or preoccupied with unjustified doubt, for example, loyalty or trustworthiness of friends or reluctance to confide. The reason for that is unwarranted fear that the information will be used maliciously against him or reading hidden demeaning/threatening meaning or persistently bear grudges or recurrent suspiciousness without justification regarding fidelity or spouse. PW3 said that this is not a mental illness but a character that can influence the appellant to act against the person close to him.

[21] PW18 was also referred to a Government psychiatrist by the name of Dr Seed Hoon Fei (PW17) pursuant to an application by the defence. PW17 found PW18 to be a normal person, free from any mental illness.

Findings At The End Of The Prosecution Case

[22] The ingredients that must be established to constitute the offence of murder under s. 302 of the Penal Code as charged are:

(i) that Yohanes anak Vincent had died;

(ii) that he died as a result of the bodily injuries sustained by him;

(iii) that the injuries of the deceased were caused by or the result of the act of the accused/appellant; and

(iv) that in inflicting the injuries upon the deceased, the accused/appellant must be proved to have either:

(a) caused them with the intention of causing death;

(b) caused them with the intention of causing such bodily injuries as the accused/appellant knew to be likely to cause death;

(c) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death; or

(d) caused them knowing that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and did so without any excuse for incurring the risk of causing death, or such injury.

(see *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497; *Untung v. PP* [2023] CLJU 1168; [2023] 1 LNS 1168; [2023] MLJU 1352; [2023] 4 MLJ 929 at para. [11] to [12]).

[23] The learned trial judge found that the death of Yohanes anak Vincent, who passed away on 28 April 2016 between 7pm and 10pm, was duly certified and not disputed. This was confirmed by PW18 (the deceased's mother), PW1 (the medical assistant of Hospital Bintulu), PW2 (the medical officer of Hospital Bintulu) and PW6, who performed the autopsy of the body of the deceased.

[24] With regard to the cause of death that the deceased died as a result of the bodily injuries sustained by him, the learned trial judge found, as testified to by PW6, that there were four fresh injuries to the head of the deceased, namely:

(i) there were severe fresh injuries of the head, from the occipital region toward the posterior bilateral parietal regions as shown by the wounds as follows:

(a) bruises over the back of the head, from the occipital region towards the posterior bilateral parietal regions, measuring 15 x 17cm;

(b) fresh injuries to the brain. There were marked gaps between the occipital bone and the parietal bones, however, there were no fractures; and

(c) the brain was severely oedematous and there were marked subdural haemorrhages over the frontal lobes and middle lobe and the base of the skull. The frontal lobe also showed cerebral surface contusions;

(ii) there were injuries of recent origin which were:

(a) the rib cage showed bilateral clavicle bone fractures that showed hard callus formations;

(b) the multiple left third to nineth rib fractures showed hard callus formation; and

(c) the left femur was fractured at the mid-shaft with hard callus formation.

These injuries were not fresh, meaning to say, that they were more than two weeks and probably less than a month old. They showed stages of untreated healing by way of callus formation and were severe. They definitely would not have been unnoticed and required immediate treatment when sustained; and

(iii) there were multiple ant bites abrasions especially over the neck, brachial flexures and popliteal flexures. PW6 was of the opinion that the baby boy was left alone for several hours after his death and when the body turned cold, the ants came to bite the skin of the cold dead body.

[25] In his report (exh. P19) made under s. 332(1) of the Criminal Procedure Code, PW6 certified that the cause of death was "head injury due to blunt surface trauma". PW6 further stated that the deceased "died from the severe head injuries probably from the head knocked onto or hit or struck or thrown from a height on to the floor or a blunt surface or a wide surface blunt object". He emphasised that the severe nature of the head injury showed that the child's head was thrown or slung to the blunt object or surface rather than just merely falling down. Examples of a blunt object or surface would be a hard floor or any blunt object, he said.

[26] When shown the three-seater sofa or chair (as the witnesses and the trial judge have described it, although we observed from our perusal of the appeal record, that it looks more to be a settee) in photograph exh. P21(20) (more of this photograph will be discussed later) and asked if it was possible that the sofa is the blunt surface or blunt object, PW6 replied:

> From the picture No. 20, we can see this is part of the apartment where **all the furniture and the floor are also blunt objects**. The head injury can be sustained upon impact with any of these objects, I cannot been [sic] point specifically any object however looking **at the blunt furniture of the sofa especially the sofa arm rest and even the floor these are the possible blunt objects or blunt surface**.
>
> (emphasis added)

From the evidence of PW6 above, it is clear that he considered all the furniture in exh. P21(20) as blunt objects or blunt surface including "the blunt furniture of the sofa".

[27] It was possible, PW6 stated, that the deceased would have immediately lost consciousness and died a short while later after the trauma. His evidence on the cause of death was accepted by the trial judge and both the prosecution and the defence.

[28] In respect of the third ingredient of whether it was the appellant that had caused the deceased's injuries leading to his death, the learned trial judge relied on the evidence of PW18 as outlined in paras. [13] to [18] *ante*. The trial judge found, based on the evidence of PW18, that the appellant, after the heated and noisy quarrel with his wife, had violently smashed ("menghempas") the head of the deceased into the sofa chair with no mercy. It was with such force that the sound of impact was very loud.

[29] It was also the finding of the trial judge that after the appellant had violently smashed the head of the deceased into the sofa chair, the deceased became motionless after a while. When PW18 told the appellant to send the deceased straightaway to the hospital, the appellant did not say a word but remained calm as if nothing had happened. After that, the deceased was left on the sofa chair without any care and attention until the morning.

[30] As for the fourth ingredient, the learned trial judge found clear evidence of the appellant's intention to kill the deceased or cause his death, from his words and conduct on the said fateful night. Based on the testimony of PW18 as set out in para. [14] *ante*, the trial judge found that the appellant had scolded PW18 and said to her "Kau jangan nak terjerit-jerit kalau kau tak nak tengok anak kau ini aku hentak kat dinding biar berkecai kepala keluar darah!". By his words, the appellant had threatened to smash the baby's head against the wall until he bleeds.

[31] The trial judge found that the appellant had then stood up, took hold of the baby by his legs and lifted him with his head dangling behind the appellant as if he was poised to slam the baby's head against the wall. PW18 was shocked and cried out aloud whilst begging for his mercy to stop the violence. The appellant then put the baby down on the sofa chair and sat down.

[32] When PW18 continued screaming out loud, the appellant became angrier and stood up. He again took the deceased by the legs and lifted him upside down with his head facing downwards. It was then that the appellant had smashed the deceased's body onto the sofa chair with such force that PW18 could hear the loud sound of the impact. The deceased was still moving after the impact, but soon afterwards, he became motionless.

[33] Based on the foregoing, the trial judge found that the appellant had the intention to kill the deceased when he uttered such threats to smash the deceased against the wall until he bled and then made good on those threats by proceeding to lift the deceased by the legs holding him upside down and then slamming him into the sofa chair. In the light of the appellant's action of smashing the deceased's head against the sofa chair with considerable force and bearing in mind that the deceased was only two months old, tender and very fragile, the learned trial judge found that the appellant had intended to kill the deceased or at least caused injuries with the knowledge that such violent slamming of the fragile two-month infant would in all probability cause death or such bodily injury as is likely to cause his death.

[34] Additionally, although recognising that motive is not an element which must be proved to establish a case of murder, the learned trial judge found that the irresistible inference from the evidence adduced is that the motive for the appellant to kill the deceased was out of jealousy. He had persistently in the past accused PW18 of having an affair with another man and that the deceased was the product of that infidelity. Motive, if shown, tends to support the case against the accused charged for murder (see *Mohd Ya'cob Demyati v. PP* [2011] 4 CLJ 758; [2011] 2 MLJ 321; [2008] MLJU 946).

[35] After subjecting the prosecution's evidence to maximum evaluation, the learned trial judge ruled that the prosecution had succeeded in making out a *prima facie* case against the appellant and called upon the appellant to enter his defence. In so ruling, the learned trial judge referred to and applied the high authorities of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393; [2005] 6 AMR 203; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65; [2003] 2 AMR 89; [2000] 2 MLRA 383; *Balachandran v. PP* [2005] 1 CLJ 85; [2004] 1 LNS 517; [2005] 2 MLJ 301; [2005] 1 AMR 321.

The Appellant's Defence

[36] The appellant elected to give evidence on oath. Other than giving oral evidence in court, the appellant referred to the statements that he made in his caution statements given on 3 May 2016 (exh. D1) and 5 May 2016 (exh. D2).

[37] He stated that on 28 April 2016, he had finished work at 5pm and consumed a bit of alcohol Cap Apek before going home to his apartment. Upon arrival at 6pm he saw PW18 feeding the baby, then held him in her arms before putting him down on the sofa. PW18 said that the baby had drunk very little milk. The appellant picked up the baby but put him down again as he looked sleepy. He then talked to his wife blaming her for not taking care of the baby as she had told him that their son was drinking very little milk.

[38] They quarrelled again that night and both were shouting at each other, but it was not for long. The appellant agreed that he had said, "1, 2, 3 and other words following it", to PW18, but this was because his wife had a strong imagination and claimed that their house was haunted by evil spirits. He had threatened to leave the house unless she stopped shouting. It was only after he had counted "1, 2, 3" that the wife had stopped shouting and he remained in the house. The situation then returned to normal.

[39] The appellant stated that he would, "never do such a thing", when he was asked about PW18's accusations that he had thrown the deceased onto the cushion of the sofa. He further stated that he thought that PW18 had "a lot of imaginations, imagining things that never happened". He said that he and PW18 were in the living room when they were quarrelling that night and PW18 never left the living room during the quarrel.

[40] The appellant went to sleep at about 10pm that night. The deceased's eyes were closed so he thought that he was asleep. However, as noted by the trial judge, the appellant stated at p. 37 of the notes of proceedings, that he had put his son on the cushion while he was taking out the mattress. He said that the deceased was sleeping at that time, and he did not notice any injuries on him. He slept through the night and had only awakened at 7am the next morning of 29 April 2016. He did not know if PW18 had woken up after he went to sleep.

[41] Upon waking up, he saw ants on the deceased's chest. He also saw that the deceased was pale, his body rigid and that he was not breathing. He then woke up PW18 and told her to quickly pack his eldest son's clothes so that they could go to the hospital immediately. He removed all the ants from the deceased's chest, changed his clothes and they proceeded to the hospital.

[42] The appellant contended that PW18 was the one who looked after his eldest son from his previous marriage as well as the deceased while he was at work. This meant that the appellant spent much less time with the deceased while PW18 took care of the deceased on her own for most of the day. There is a higher probability, the appellant argued, that the injuries sustained by the deceased could have occurred under the watch of PW18 rather than when he was with the appellant by virtue of the time PW18 spent with the deceased.

[43] He suspected that the deceased's death was due to not consuming enough milk. He so suspected because PW18 had told him about the deceased's lack of milk intake. This, he argued, is indicative of his lack of familiarity with the deceased's daily milk intake, showing that he had spent much less time with the deceased than PW18.

[44] Further, the appellant contended that his evidence in court was corroborated by the statements he made in his cautioned statements exhs. D1 and D2. These statements were made shortly after the incident and about two years before the trial. If he was lying or covering up the truth, there would be likely gaping holes or contradictions in his sworn testimony in court.

[45] At the end of the case for the defence, the trial judge found that the defence put forward by the appellant was just a bare denial. The appellant denied that there was an incident of smashing the body of the deceased into the sofa chair on the night in question as PW18 had asserted.

[46] Having considered the defence and the totality of the evidence, the trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution case. At para. 78 of the GOJ, the trial judge said:

> Having evaluated the defence of the Accused person, re-evaluated the Prosecution's evidences in the light of the Accused person's defence, and applying the relevant law and principles, this court does not accept or believe the said defences raised by the Accused person and also finds that the Accused person's defence has not raised in the mind of this court, a reasonable doubt as to the guilt of the Accused person.

[47] Accordingly, the appellant was convicted of the offence under s. 302 of the Penal Code and sentenced to death.

The Appeal

[48] Although eight grounds of appeal were raised in the petition of appeal, learned counsel for the appellant has pursued only the following grounds in the written submission and at the hearing of the appeal before us:

(i) whether the learned trial judge had erred in law and in fact in arriving at the decision that the appellant was the one that caused the death of the deceased;

(ii) whether the learned trial judge had erred in law and in fact in arriving at the decision that the element of 'intention to kill' has been fulfilled although the element has yet not been proven;

(iii) whether the learned trial judge had erred in law and in fact in failing to consider that not only the appellant but also PW18 was taking care of the deceased;

(iv) whether learned trial judge had erred in law and in fact in failing to consider the contradictory testimonies or "double statements" by PW18; and

(v) whether the learned trial judge had failed to consider the defence of the appellant and had erred in not giving him the benefit of the doubt.

Analysis And Findings Of This Court

[49] In considering the petition of appeal and in particular the issues raised by the appellant's counsel during submissions, we are guided by the principle that in a criminal appeal, the duty of the appellate court is to consider whether the conviction is right. This court in *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389; [2005] 5 MLJ 409; [2004] 6 AMR 825 reiterated the principle that the correct approach is not to consider whether the decision is wrong but whether the conviction is safe.

First Issue – Whether The Trial Judge Erred In Finding That The Appellant Had Caused The Death Of The Deceased

[50] Counsel for the appellant argued that the trial judge had erred in law and in fact in failing to consider that based on the testimonies of PW6 and PW18, the injury that caused the death of Yohanes was not inflicted by the appellant. This is so, counsel said, because PW18 had told a materially different story on the cause of death of the deceased than that concluded by PW6, the pathologist.

[51] In support of the foregoing contention, counsel first referred to the evidence of PW6 in examination-in-chief below:

(i) in relation to the head injury, PW6 stated that the gapping indicates that the joints or sutures of the bones had separated due to impact with a blunt surface or object. He explained that in a child of the age of about two months as in this case, the bones of the skull are not hard yet compared to adult bones, so the bones seldom fracture. And because the sutures are not joined yet or fused, upon impact the bones become separated and give the sign of gapping;

(ii) in respect of the cause of death, PW6 testified:

Q: You also stated that the cause of death was head injury due to blunt surface trauma. Can you give examples of blunt surface?

A: The blunt surface trauma that I mentioned can be the impact of the head of the child to any blunt object or surface such as a hard floor or any blunt object.

Furthermore, the severe nature of the head injury further emphasises that the child head being thrown or slung to the blunt object surface rather than just merely falling down;

(iii) in regard to the blunt object or blunt surface, PW6 said:

Q: If we refer you with photograph No. 20. Can you see the sofa in purple colour there, is there any possibility that the sofa is the blunt surface or blunt object?

A: From the picture No. 20, we can see this is part of the apartment where all the furniture and the floor are also blunt objects. The head injury can be sustained upon impact with any of these objects, I cannot been point specifically any object however looking at the blunt furniture of the sofa especially the sofa arm rest and even the floor these are the possible blunt objects or blunt surface;

(iv) under cross-examination, PW6 stated as follows in regard to the cause of death:

Q: From your post mortem examination the head injury was sustained only once?

A: Yes.

...

Q: It is impossible for the injuries to the back of the head and the subsequent internal injuries in the head to have been caused by the baby's head landing on the soft surface such as a sofa cushion. Do you agree?

A: I will not be able to say whether impossibility or not but it is more likely that the child's back of the head impacted directly to a hard surface. If we refer to the sofa, my opinion could be the child's head impacted the hard components of the sofa chair like the arm rest because for it to land directly on a soft surface such as the sofa cushion that you suggested may not be likely to cause such severe injuries unless it bounced and dropped on the hard surface such as the floor.

(See ROA (Vol. 2a) at p. 70 lines 1839 to 1848).

[52] Based on the above, counsel said, PW6 had given precise evidence that the cause of death was impact with a blunt and hard object and that impact with the cushion of the sofa in photograph 20 shown to him in court, which in his opinion was a soft surface, was not likely to cause such severe injuries.

[53] PW18, on the other hand, counsel said, stated as follows in regard to the cause of death of the deceased:

(i) "After that I ran into the bed room and cried and screamed. At that time the Accused has said in a harsh tone and counted "1 ..., 2 ... I immediate ran out of the room and the Accused said "Look at this, if you don't want to see him die". At the same time the Accused was standing up and holding both the Deceased's legs with the Deceased head below them. When I saw the Accused doing this I immediately stopped crying because I was afraid that the Accused would smash the Deceased. However the Accused still holding the Accused in the same manner at that time, I saw the Accused smash the Deceased on to the long sofa cushion which was the sleeping place of the Deceased.

(Counsel's translation of PW18's witness statement (WS-PW18) para. 17 LL 3133 to 3112 pp. 142 to 143 of ROA Vol 2a);

(ii) in her oral testimony, PW18 had testified that:

Q: I refer you to paragraph 17 of your WS. When you mentioned that the Accused smashed the Deceased on to the cushion sofa with the assistance of the photographs (Exhibits P21 (Photograph No. 20) can you tell the court the place or the position when the Accused smash the deceased on the sofa cushion?

A: The witness is pointing to the Exhibits P21 (Photographs No. 20), the three seater sofa cushion.

(see Examination-in-Chief of PW18: NOP-ROA (Vol 2a, page 147 LL 3125 to 3131)

Counsel contended that the alleged place of impact described by PW18 was precise and it was on the cushion and not on any hard and blunt object.

[54] Further down, PW18 testified as follows:

A: I can't tell the strength used by him to smash the deceased but I can hear the impact sound when the smashing of the deceased occurred.

Q: In other words, do you mean that the impact sound that you hear is very strong?

A: Yes.

Counsel said that the above answer given by PW18 was to a leading question.

[55] Further, counsel highlighted the following evidence of PW18 given under cross-examination:

(i) Q: You alleged that Vincent smashed the Deceased into the cushion of the sofa after he returned from work on 28.4.2016. Is that correct?

A: Yes.

(ii) Q: Before the Accused allegedly smashed the Deceased into the cushion of the sofa, he did not hit or harm the Deceased in any way apart from holding him. Do you agree?

A: I disagree.

Q: Which part of the Deceased body do you allege the Accused hit the Deceased after he returned from work on 28.4.2016?

A: He holds the body on both legs upside down, then he smashed the baby into the cushion.

Q: That is all you allege that the Accused did?

A: Yes.

Q: Holding the Deceased's legs is not hitting the Deceased. Do you agree?

A: He holds the baby's legs in a dangling manner then he said if I did not stop crying he will smash the baby's head to the wall.

Q: But the Accused never smash the Deceased's head into the wall. Do you agree?

A: I agree.

Q: Do you agree your allegation apart from the dangling and smashing of the deceased into the cushion shows that the Accused never hit the Deceased with anything?

A: Yes.

Q: I show you P21(20). Do you agree that the cushion of the sofa marked "X" are very thick cushion.

A: I agree.

[56] Having regard to the evidence of PW6 and PW18 set out above, counsel submitted as follows:

(i) PW18 was the only alleged eye-witness but the story she told was materially different from the conclusion arrived at by the pathologist. PW18's version, in essence, left no chance of the appellant having hit the deceased with a blunt object or hitting the head of the deceased into a blunt object such as the sofa arm rest. The pathologist, who was not an interested witness, had given precise evidence that the cause of death was impact with a blunt and hard object. There was no way that the deceased could have died in the manner stated by PW18 and therefore, counsel said, her evidence was indeed incredible; and

(ii) there was no evidence that the appellant caused the injury using any blunt object or that his act on a blunt object had caused the injury. During cross-examination, the defence had challenged PW18 and put it to her that she was the person that had caused the fatal injuries. It was

also put to her that the appellant had done nothing to the deceased and had gone to sleep after they had quarrelled. Bear in mind, counsel said, the deceased was in the custody of PW18 on the day of the incident.

[57] The essence of the argument of the defence in this regard is that the pathologist's (PW6) opinion at trial that the impact of the child's head landing directly on the cushion of the sofa was unlikely to have caused the severe head injury which had led the death of the child, meant that the child could not have died in the manner described by PW18, which was, at the hands of the appellant. Thus, the defence relies on the opinion of the pathologist expressed at trial to refute the prosecution's case that the appellant had caused the bodily injuries to the child that had led to his death.

[58] We emphasise that, as provided under s. 332 of the CPC, the purpose of PW6, a Government pathologist, in holding a post-mortem examination of the body of the deceased child was to ascertain and certify as to the cause of death. PW6's ensuing report (P19) shall be admissible as evidence and shall be *prima facie* evidence of the nature of the injuries suffered and the cause of death (s. 332(2) of the CPC). As stated earlier, the learned trial judge accepted the evidence of PW6 that the child had died from the severe head injuries that he had sustained probably from his head having been "knocked onto, or hit or struck or thrown from a height on to the floor or a blunt surface or a wide surface blunt object".

[59] The question arising is whether PW6's opinion at trial that it was not likely that impact with the cushion of the three-seater settee as shown in photo P21(20), could have caused the severe head injuries sustained by the deceased, has raised a reasonable doubt in the narrative by PW18. We found not.

[60] In the first place, PW6's opinion that it was unlikely that the impact of slamming or throwing or smashing the deceased, a child of tender age at two months, into the cushion of the three-seater settee pictured in exh. P21(20) was unlikely to have caused the severe head injuries sustained by the deceased was inadmissible and irrelevant because this is a matter within the common experience and knowledge of the trial judge.

[61] It is settled law that the opinion evidence of an expert is only admissible on a matter calling for expertise. The court cannot accept opinion evidence unless there is a relevant issue before the court which is beyond the court's competence wherein the court may accept an expert opinion under s. 45(1) of the Evidence Act 1950. Section 45(1) of the EA provides as follows:

Opinions of experts

45 (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially

A skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

[62] Thus, the Federal Court in *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368; [1984] 2 MLJ 19, at pp. 372 to 373 (CLJ); p. 23 said:

> The scope of this section can be found in the commentary in *Sarkar on Evidence* 12th Ed at page 488 where, while recognizing that opinion in so far as it may be founded on legal evidence shall be the function of the tribunal whose province alone it is to draw conclusions of law or fact:
>
> > There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, *eg*, **when the question involved is beyond the range of common experience or common knowledge** or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule Is relaxed and expert evidence is admitted to enable the court to come to a proper decision.
>
> (emphasis added)

[63] Whilst it is clear that opinion evidence is admissible on a matter calling for expertise, it is equally clear that where the matter in question is within the common experience and knowledge of the tribunal of fact, the opinion evidence of an expert is inadmissible because it becomes unnecessary: per Lawton LJ in *R v. Turner* [1975] QB 834; [1975] 1 All ER 70; [1975] 2 WLR 56.

[64] This principle is underscored in *Chou Kooi Pang & Anor v. PP* [1998] 3 SLR(R) 205; [1998] SGCA 48; [1998] SCD 117; [1998] 3 SLR 593, at p. 599 where the Singapore Court of Appeal held:

> Further, it is well established that *expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. If, on the proven facts, a judge can form his own conclusions without help, the opinion of an expert is unnecessary*; *R v. Turner* [1975] QB 834. Thus, a psychiatrist's evidence was held inadmissible where its purpose was, in effect, to tell a jury how an ordinary person, not suffering from any mental illness, was likely to react to the strains and stresses of life: *R v. Weightman* (1991) 92 Cr App R 291. In *R v. Masih* [1986] Crim LR 395, the court expressed the view that in the case of an IQ which, though low, was within the range of normality as understood by psychologists, the adducing of expert evidence was not justified.
>
> (emphasis added)

[65] We also draw upon the authoritative insights on the distinction between matters calling for expertise and matters within the experience and knowledge of the tribunal of facts, presented in *Sarkar, Law of Evidence, In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore*, SC Sarkar, Malaysia edn, Vol 1 [ss. 1 to 55] at pp. 1456 to 1457:

> The rule is well established that the opinion of experts cannot be received in evidence in cases where the subject-matter of inquiry is such that it may be presumed to lie within the common education, moving in the ordinary walks of life [*New Eng Glass Co v. Lovell*, 7 Cush 319 and many cases cited in Rogers, 2nd Ed. s. 8], or which does not require any peculiar habits or course of study in order to qualify a man to understand it.
>
> ...
>
> It is only where the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts, that the witness may supply opinion as their guide" [*Kennedy v. People*, 39 NY 245]. So that the testimony of experts is inadmissible in regard to matters upon which one individual can form a judgment as well as another, both having equal knowledge of the circumstances [*Hart v. Hudson R B Co*, 84 NY 56, 60, 61 cited in Rogers, 1883 Ed p. 13]. *Thus, a physician could not testify as to the possibility of a rape having been committed in a particular manner described by the prosecutrix, as it was a question of mere relative strength or mechanical possibility, which an athlete or a mechanic could have answered as well as a physician, and every man upon the jury as well as either [Cook v. S, 24 N J Law 8431. The question of what is the proximate cause of an injury is not a question of science, or of legal knowledge, but is a fact to be determined by a jury from surrounding circumstances [Milankee &c R R Co v. Kelogg, 94 US 4691. Detectives could not be asked as to whether it was possible to commit a robbery in the manner charged [People v. Morrigan, 20 Mich 11. Whether a street-crossing is unsafe or dangerous is not a question of science or skill, upon which it is proper to receive the opinion of witness [City of Parsons v. Lindsay, 26 Kan 426, 4321. What are the chances of a man falling out of a window on the fourth floor of a house is not a question for a medical expert [Raianikbai v. New India Ass Co, A 1956 B 633].*
>
> (emphasis added)

[66] In the instant case, the matter or question calling for the expertise of PW6 was the cause of death of the deceased. It bears repeating that PW6 had indeed testified, as explained in paras. [25] and [58] above, on the cause of death. Such evidence was accepted by the prosecution, the defence and the court.

[67] On the other hand, it is our considered view that the matter or question of whether the impact of slamming or smashing or throwing with force the deceased, a child of tender age at two months, onto the cushion of the three-seater settee pictured in exh. P21 (20), was unlikely to cause the fatal head injuries suffered by the deceased, relates to the proximate cause of injury. In our considered view, the proximate cause of injury is not a

question of science but is a fact to be determined by the trial judge from his common experience and knowledge and surrounding circumstances (see *R v. Turner* [1975] QB 834; [1975] 1 All ER 70; [1975] 35 WLR 56, at p. 841; *Milwaukee & St Paul Railway Company v. Kellogg*, [1876] 94 US 469 cited in *Sarkar, Law of Evidence*, *In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore*, *(supra)*).

[68] Similarly, just as the physician in *Cook v. S* 24 N J Law 843, cited in the same textbook, *supra*, could not testify as to the possibility of a rape having been committed in a particular manner described by the complainant, because it is a matter of which the ordinary knowledge and experience of mankind could enable them to see what inferences should be drawn from the facts. The pathologist (PW6) in our present case, could not also testify as to the unlikelihood of the deceased having sustained the severe head injuries from being slammed into the cushion of the three-seater settee.

[69] Secondly, the issue of whether the act of the appellant in slamming or smashing the deceased, a tender and fragile two-month-old baby, into the cushion of the three-seater sofa, had caused the fatal head injury, is an eminent matter and an ultimate issue that the trial court had to determine. To allow PW6's express opinion on this ultimate issue would be usurping the function of the trial judge to draw his own inferences on the issue from the facts of the case.

[70] It has been said that historically, the courts have striven to prevent any witness from expressing his opinion on an ultimate issue, that is one of the very issues which the court has to determine: per Lord Lindley MR in *Haynes v. Doman* [1899] 2 Ch 13; [1895-99] All ER Rep Ext 1468. The justification of the rule is that in so far as such evidence might unduly influence the tribunal of fact, it prevents witnesses from usurping the function of the court: witnesses are called to testify, not to decide the case (see Adrian Keane, *The Modern Law of Evidence*, 2nd edn, at p. 371; *Phipson on Evidence*, 19th edn, para. 33-12 at p. 1180; *R v. Lanfear* [1968] 2 QB 77; [1968] 1 All ER 683; [1968] 2 WLR 623; *R v. Hipson* [1968] 112 SJ 945).

[71] Thus, in *Ong Chan Tow v. Regina* [1963] CLJU 88; [1963] 1 LNS 88; [1963] MLJ 160, Winslow J said:

> In this case there was some justification for the learned district judge's strictures that the expert was extremely biased, for, not only did he flatly refute the existence of simple facts like tyre marks on the road and on the grass verge which the police say they saw, *but he expressed emphatic opinions on the possible speed of the motor-car and how it would probably have been travelling round the bend towards the junction, on which matters the learned district judge had ample materials from which to form his own independent opinion*.
>
> Further*, questions relating to the existence of debris or broken glass on the road which help to pin-point the site of a collision are clearly matters for the court and not the expert. Such an expert should not be asked to give his conclusion on matters which are eminently matters for the court to decide, otherwise he would tend to arrogate to*

himself the functions of the court. The motoring expert is there to help the court on technical and mechanical matters, not to draw inferences which even a layman can equally well draw.

(emphasis added)

[72] In the case of *Lim Ting Hong v. PP* [1966] CLJU 90; [1966] 1 LNS 90; [1966] 2 MLJ 119, at p. 121, the same learned High Court Judge held:

Apparently the reason for the withdrawal lies in the fact that the expert was asked whether he could say that the appellant was a member of the Ang Bin Hoey triad society or not, as this was a matter which the court itself had to determine on the evidence of the finding of the writings in his possession and after considering the presumption arising under section 15(1) and the case as a whole. The expert was in no position to say whether or not the appellant was such a member.

[73] Further illustrations of this rule can be found in *Sarkar, Law of Evidence, In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia & Singapore* (*supra*), at p. 1456:

Thus, evidence is inadmissible to prove that one name [*North C & M Brewery Co,* 1899 AC 83], or one trademark [*Bourne v. Swan & Edgar*, 1903, 1 Ch 211] so resembles another as to be calculated to deceive. To put it briefly, *a witness may not, on other than scientific subjects be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a drive is careful; a road dangerous; or an assault for homicide justifiable* (Tay s. 1419 quoting Greenleaf, s. 441). *Experts will not be allowed to give their opinions* upon the construction of documents, for this, being a matter of law, is a question solely for the court [*Grove v. Bulawayo*, The Times 30th March 1898]; nor upon matters of legal or moral obligation, nor *upon what would probably have happened had the parties acted in one way rather than another, or as to the probable cause of an injury which occurred to cattle while in railway truck* (Hals 3rd Ed Vol 15 para 588; Phip 11th Ed p. 517].

(emphasis added)

[74] We hasten to add that the courts have demonstrated flexibility in the application of the rule in certain circumscribed situations. In this regard, *Phipson on Evidence*, (*supra*), paras. 33 to 12 at p. 1180 states:

Nonetheless, in cases where it is unavoidable, expert evidence may be given on the question which is the ultimate or real issue in the case. (Although in many cases expert evidence on the ultimate issue will be inadmissible: *McNeil v. FCT* (2003) 202 A.L.R. 35 Fed Ct of Aus; *Allstate Life Assurance Co v. Australia and New Zealand Banking Group Ltd (No .6)* (1996) 137 A.L.R. 138). *In general an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact.* (*Pora v. R. (New Zealand)* [2015] UKPC 9 at [27]). *In certain extreme situations it is possible for expert evidence to be dispositive of the case, as where there is evidence which only an expert could provide and which is unchallenged by any other expert evidence.* (See *Anderson v. R* [1972] AC 100 PC; cf. *R. v. Sanders* (1991) 93 Cr App R 245 CA. See further, para.

A 33-66). Particularly where a jury is the trier of fact, on central matters there are inherent dangers in an expert expressing his opinion as an unalterable truth. (*Pora v. R. (New Zealand)* [2015] UKPC 9 at [27]).

(emphasis added)

[75] Based on the foregoing, the situations identified by the learned authors
B of *Phipson on Evidence* (*supra*) as to when an expert may be allowed to testify on the ultimate issues are:

(i) where necessary in order that the expert evidence provide substantial help to the trier of fact; and

C (ii) where there is evidence which only an expert could provide and which is unchallenged by any other expert evidence.

It is our considered view that the opinion evidence of PW6 that the act of the appellant in slamming the child into the cushion of the three-seater settee was unlikely to have caused the fatal head injuries suffered by the child was
D of no substantial assistance to the trial judge because this is a matter within the common experience and knowledge of the trial judge. By the same token, neither is this a matter which only an expert could provide.

[76] Thirdly, we say that, in any event, no weight should be attached to the opinion of PW6 on this matter because his opinion was speculative and a
E matter of conjecture. As a general rule, the facts upon which an expert's opinion is based must be proved by admissible evidence: Per Lawton LJ in *R v. Turner* [1975] 1 All ER 70; [1975] 2 WLR 56; [1975] QB 834 at p. 840. In other words, if an expert relies on the existence of some fact basic to the issue on which he expresses his opinion, that fact must be proved
F (see also *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] CLJU 118; [1967] 1 LNS 118; [1967] 2 MLJ 35 and *Untung v. PP* [2023] CLJU 1168; [2023] 1 LNS 1168; [2023] MLJU 1352; [2023] 4 MLJ 929 at [73] [74] CA).

[77] As learned defence counsel himself has highlighted, what had occurred
G at trial in the present case was this. After PW6 had given admissible expert opinion that the deceased had died from head injury due to blunt surface trauma, the photo exh. P21(20) was shown to him and his attention drawn to the three-seater sofa (settee) purple in colour shown therein. The question of whether it was impossible for the head injuries sustained by the deceased
H to have been caused by his head landing on the sofa cushion depicted in P21(20) was then raised during cross-examination. For clarity, the excerpts of PW6's cross-examination relied on by the defence is reproduced below:

Q: It is impossible for the injuries to the back of the head and the subsequent internal injuries in the head to have been caused by the
I baby's head landing **on the soft surface such as a sofa cushion**. Do you agree?

A: **I will not be able to say whether impossibility or not but it is more likely** that the child's back of the head impacted directly to a hard surface. If we refer to the sofa, my opinion could be the child's head impacted the hard components of the sofa chair like the arm rest because for it to **land directly on a soft surface such as the sofa cushion that you suggested** may not be likely to cause such severe injuries unless it bounced and dropped on the hard surface such as the floor.

(emphasis added)

(See also para [52] (iv) *ante*)

[78] To our minds, the question posed by counsel is loaded and assumed that the sofa cushion in the photograph P21(20) was a soft surface. PW6, in turn, had also assumed that the cushion of the sofa was a soft surface. From the above, it is plain to us that PW6's opinion is predicated on his assumption of the existence of the fact that the cushion of the three-seater sofa was a soft surface. However, there was no evidence led of a physical inspection of the sofa or settee and its cushion and frame leading to a finding that the sofa cushion was a soft surface. Instead, the assumption was drawn from a mere cursory viewing in court at trial of the photo P21(20) showing the sofa and the cushion. It is mere speculation and conjecture. In our considered view, the existence of the fact basic to the issue on which PW6 had expressed his opinion (*ie*, that the cushion was a soft surface) had not been proved. This assumption is the more doubtful considering that, from our observation of the three-seater settee in the photo exh. P21(20), it is supported by a wooden frame, which looked to be a firm and solid structure. Whether this would have made a difference in PW6's opinion evidence is not considered. We are therefore of the firm view that this is additional ground to hold that PW6's opinion evidence on this issue carries little weight and is of no probative value.

[79] In any event, even if PW6's aforesaid opinion evidence was admissible, it is trite that the weight to be attached to it, if any, is a matter entirely for the tribunal of fact. The duty of experts, it has been said, 'is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'. (Per Lord President Cooper in *Davie v. Edinburgh Magistrates*, 1953 SC 34 at 40; *Phipson on Evidence*, 19th edn, Thomson Reuters, at pp. 33 to 67).

[80] The trial judge found that PW6's evidence concerning the fatal head injuries sustained by the deceased corresponded with the evidence of PW18 on the violent act of the appellant in slamming the two-month-old infant into the settee where his body organs were still very fragile and tender and any use of force on him would cause fatal harm. The learned trial judge stated as follows in his GOJ:

> 32. The fatal injuries suffered by the deceased corresponded with the evidence by PW18 on the said violent action by the Accused, causing head injury to the Deceased, by slamming the Deceased onto the Sofa Chair. It must be noted that the Deceased at that material time is only 2 months old whereby the body organ is still very fragile and vulnerable and any force used against the Deceased will definitely cause fatal harm to the Deceased and cause the death of the Deceased.

Later at para. 63 of the GOJ, the learned trial judge said:

> The Accused himself admitted while under cross-examination by the Prosecution that as the Deceased at that time, was only 2 months old and if any violence force is applied to the Deceased, it would definitely harm the Deceased as his head and body was still soft and fragile.

[81] Thus, the learned trial judge in considering PW6's evidence on the cause of death of the infant, had concluded that PW6's description of the fatal head injuries corresponded with the evidence of PW18 that the appellant had violently slammed and smashed the infant into the three-seater settee. The trial judge further found that any use of force upon the two-month-old infant whose body organs were still very fragile, and tender would cause fatal harm, a fact admitted by the appellant himself in his sworn testimony. This, in our judgment, is a tacit rejection by the learned trial judge of PW6's opinion evidence that the act of the appellant in slamming the infant into the three-seater settee could not have caused the 30 fatal head injuries. Instead, the trial judge accepted PW18's eyewitness account that the infant was rendered motionless almost immediately after being slammed into the three-seater settee.

[82] A trial court's evaluation or lack of it, of the direct evidence of an eye witness as against the evidence of an expert witness was considered in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1. One of the main issues before the High Court was whether the will in question was a forgery. The High Court preferred the evidence of two handwriting experts who testified that it was a forgery over the direct evidence of two witnesses who witnessed the execution of the will. The Court of Appeal reversed the High Court on this issue. On further appeal, the Federal Court held that:

> (3) It was difficult to disagree with the observation of the Court of Appeal that the High Court had erred in determining the issue of forgery solely, if not substantially, on the basis of the evidence of the two handwriting experts PW4 and PW6 to the exclusion of relevant and direct evidence from the two witnesses DW2 and DW3 who had actually witnessed the execution of the will by the deceased at the material time (see para 38).

[83] Although *Gan Yook Chin*, (*supra*), is in the context of a civil trial, we are in no doubt that the principle that it is wrong to determine an issue solely or substantially on the evidence of expert witnesses, to the exclusion of

relevant and direct evidence from eyewitnesses, is equally applicable in criminal proceedings like the present. Hence, even if, in the present case, PW6's aforesaid opinion evidence was admissible, it is entirely for the trial judge to decide the weight to be attached to it. He had clearly preferred the direct eyewitness account from PW18 over the aforesaid opinion evidence of PW6. We have no reason to disagree with him on this.

[84] As PW6's opinion evidence on this matter expressed at trial was inadmissible and of no probative value, and in any event, rejected by the trial judge, the defence has not raised a reasonable doubt, on this account, in the case for the prosecution that the child had died in the manner described by PW18, which was, at the hands of the appellant.

[85] Now, what was the evidence before the trial judge, as the trier of fact, that led him to conclude that the appellant had inflicted the fatal injuries on the deceased, in other words, that the deceased had died at the hands of the appellant?

[86] Firstly, at paras. 33 to 35 of the GOJ, the learned trial judge had considered PW18's evidence, as outlined at paras. [13] to [16] above, on what had occurred on the evening of 28 April 2016. He accepted the evidence of PW18 that it was the act of the appellant in slamming without mercy and violently of the two-month-old baby, still tender and fragile, into the three-seater sofa cushion, that had caused the severe head injuries leading to his death.

[87] The learned trial judge's reasons for accepting the evidence of PW18 on this are:

(i) first, although PW18 could not describe the strength with which the appellant had smashed the deceased into the sofa cushion, she could hear the sound of the impact and it was very strong. In regard to the challenge by defence counsel of this evidence on account of it having been given in answer to a leading question, the defence had the opportunity and did in fact put this evidence to the test by severely challenging PW18 on this matter during her cross-examination. The learned trial judge at para. 36 of the GOJ demonstrated that he had considered this point, but found PW18 to be a credible witness and accepted her evidence on the sound of impact. The trial judge said:

> 36. This court finds that PW18 also is very consistent in her answers when she was under cross-examined by the Defence counsel. This is what she said:
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> Q: When the deceased allegedly impacted with the cushion, there could not had been any impact sound. Do you agree?
>
> A: I disagree.

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Q: The impact sound if any that will be very minimum. Do you agree?

A: I disagree.

Q: Do you agree that your allegation is the accused dropped the deceased on the sofa cushion and did not smash the deceased on the said cushion.

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A: I disagree.

Q: Your allegation is the accused did not use much strength when smashing the deceased into the sofa cushion. Do you agree?

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A: I disagree. Because the baby is still small it might not harm an adult but the deceased is still a baby.

Q: But you told the court earlier you could not tell the strength use by the accused to smash the deceased. Is that correct?

A: Yes, correct but I can hear the impact sound.

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We have no reason to disturb the finding of fact by the trial judge on this point;

(ii) second, the trial judge found that PW18's narration of the events during the quarrel leading to the act of violence on the deceased by the

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appellant was corroborated by the neighbours, Shahminan bin Masu'ut (PW7) and Noryanie binti Abdullah (PW14). They testified that they heard the loud noises and sounds of quarrelling between the appellant and his wife from the appellant's apartment between 7pm to 9pm in the evening in question. From our perusal of the appeal record, PW7 had

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given unchallenged evidence (see witness statement WS-PW7) that he could clearly hear the appellant's voice counting "satu, dua" and the wife answering several times in the Iban dialect, "Anang" and "Udah Agik", which meant, "Jangan" and "Cukup". He then heard the appellant's wife and the elder child crying for about half an hour. He stated further that the lights in the appellant's apartment were turned off

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at 9pm. PW14 in her witness statement (WS-PW14) stated that at about 7pm that evening, she simultaneously heard the unusual strong cry of a young child from the direction of the appellant's apartment and the voice of someone saying, "Udah! Udah agik!" which meant, "Sudah atau cukup". This was followed by the sound of a woman crying very loudly

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for a quite a while mixed with loud noises; and

(iii) third, the trial judge found that PW6's evidence of the severe head injuries suffered by the deceased corresponded with the evidence of PW18 of the violent act of the appellant in slamming the two-month-old

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infant onto the settee where his body organs were still very fragile and tender and any use of force on him would cause fatal harm. We have referred to this evidence and the finding of fact by the trial judge at paras. [80] to [81] *ante*.

In addition, it is our observation that the trial judge, as the trier of fact, had drawn on ordinary human experience and knowledge, to infer that the body organs of the two-month old infant would have been tender and fragile and any act of violence such as slamming him with force into the cushion of the settee would have caused him the fatal head injuries described by PW6. PW18 had also testified, under cross-examination, that smashing an adult with much strength into the sofa cushion might not cause harm but not so with the deceased who was still a baby. Crucially, the appellant himself had agreed during cross-examination that at the material time, the deceased's head and body were still soft and fragile as he was only two months old and any violent force applied on him would do him harm. We find no reason to disturb the inference and finding of fact of the trial judge on this point which is a matter well within ordinary human experience.

[88] Secondly, from our perusal of the appeal record, we find further corroboration of the narrative of PW18 that it was the appellant that had inflicted the fatal head injuries on the deceased. We again emphasise that PW6 testified that the child would have immediately lost consciousness and died a short while later after the trauma. From the testimony of PW18 set out at paras. [16] to [17] above, the child was already motionless shortly before 9pm and left unattended on the sofa cushion until morning. Both PW18 and the appellant had testified that when they woke up at 7am the next morning, the body of the deceased was swarmed by ants. PW6 confirmed the presence of ants as he noted that there were multiple post-mortem ant bites abrasions especially over the neck, brachial flexures and popliteal flexures of the body. Crucially, PW6 stated that:

> I believe that the baby might has been left over several hours after death and the body becomes cold, where ants then bite the skin of the cold dead body. It is important to note, ants do not comes to a fresh warm body or immediately after death where the body is still warm.

[89] In our considered view, PW6's evidence that the presence of the multiple ant bites abrasions over the body of the deceased indicated that the latter was left unattended over several hours after death, lent credence to PW18's narrative that the deceased had died at the hands of the appellant shortly before 9pm and left unattended on the sofa until the morning.

[90] Thirdly, the appellant's state of mind and character at the material time supported the narrative by PW18 that it was him that had caused the fatal injuries. PW3, a Government Senior Consultant Psychiatrist, who had the appellant under observation for three months from 27 December 2016 concluded that the latter had a paranoid personality. Persons having this personality disorder, which begins at early adulthood, have pervasive distrust of others such that their motives are interpreted as malevolent. They can have enduring suspicion without sufficient basis or preoccupied with unjustified doubts for example on loyalty or trustworthiness of friends or a

reluctance to confide. This is due to unwarranted fear that information will be used maliciously against them or reading hidden demeaning/threatening meaning or persistently bear grudges or recurrent suspiciousness without justification regarding fidelity of spouse. A person having either two or more of these aforesaid traits are considered to have a paranoid personality disorder. This, according to PW3, is not a mental illness but more to do with character which could influence the appellant to take action against the person close to him.

[91] PW18 had testified that the appellant was persistent in accusing her of having an affair with another man behind his back and went so far as alleging that the deceased was not his biological son but the issue of PW18's extra marital affair. This led them to constantly quarrel. This piece of evidence was not rebutted by the appellant during the case for the defence. We agree with the learned Deputy Public Prosecutor, that the appellant's paranoid behaviour of jealousy towards his wife is consistent with the diagnosis by PW3 that the appellant had paranoid personality disorder. PW3's further evidence that this disorder could influence the appellant to take action against the person close to him gives weight to the evidence of PW18 that the appellant had acted violently in slamming the infant into the three-seater settee thereby causing his death.

[92] In evaluating this evidence, the learned trial judge viewed it from the perspective of motive. Although motive is not a necessary ingredient to prove murder, but if shown, it tends to support the case against the accused so charged (see *Mohd Ya'cob Demyati v. PP* [2011] 4 CLJ 758; [2011] 2 MLJ 321; [2008] MLJU 946). The trial judge appreciated the law and the evidence on this issue and said:

> 40. To establish a case of murder, motive is not an element which must be proven. However, it would if proven, tend to support the case against the Accused so charged. This court finds that there is an irresistibly inference to show that the motive for the Accused to kill the Deceased, presumably is jealousy because he accused PW18 of having an affair with another man behind his back and the Deceased was the product of that illicit affair.

[93] In the light of the evidence before the trial judge, we find that he has not erred in drawing the inference that the motive for the accused to kill the deceased was out of jealousy emanating from recurrent suspiciousness regarding the fidelity of his spouse augmented by his suspicion that the deceased was a product of that purported illicit affair. The proof of such motive in the instant case supported the case against the appellant that he inflicted the fatal injuries.

[94] Fourth, we observed that the learned trial judge had considered the defence of the appellant that he had not inflicted any fatal injury on the deceased on the night in question and weighed it against the evidence of PW18 who testified that he did. The trial judge determined that on this point, PW18 was the more credible witness and accepted her evidence. This determination may be readily observed from the passages in the GOJ stated below:

> 73. From the testimonies of the Accused and PW18, they are accusing each other of causing the death of the Deceased. It can safely be assumed that someone did inflict harm to the Deceased, less than 24 hours before the Deceased was brought to the hospital, to be examined by PW2 and further the Deceased was in the joint custody of both PW18 and the Accused. According to the Accused, since he did not inflict the fatal injury, then PW18 did. One would expect the Accused to immediately complain about PW18 having harmed the Deceased but the Accused never complain that PW18 inflicted the fatal injury. PW18 however complained that the Accused slammed the Deceased, violently and without mercy against the Sofa Chair and this complaint is consistent with the injuries suffered by the Deceased. This court finds that PW18's version of the events that fateful night, showing that the Accused was the one who inflicted the fatal injuries on the Deceased, is more credible.
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> 74. Besides that, there is also no evidence to show the involvement of other person except the Accused who causes the fatal injuries to the Deceased.
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> 75. Even though the Defence suggested that the injuries suffered by the Deceased can be caused by a boy of 6 years old like the Accused's son from his first marriage who was also living in the said house, However this contention is rejected by PW6, based on his observation of the injuries suffered by the Deceased. ...
>
> 76. Further the Defence also sought to suggest that the head injury suffered by the Deceased can be caused by any accidental act. This allegation is also dismissed by PW6, based on his observation of the injuries suffered by the Deceased.

[95] We are of the view that the trial judge was not wrong in making the above finding. The appellant's stance was like, "I didn't do it and because I didn't do it, she did it!". As the trial judge has observed, if indeed it was PW18 that had inflicted the fatal injury, one would expect the appellant to have complained about it, but he did not. PW18, on the other hand, had complained of the act of the appellant in violently slamming the infant into the cushion of the three-seater settee. The appellant's attempt to shift blame to his six-year-old son or that the fatal injury was accidental was rejected by the trial judge on account that PW6 had dismissed and rejected such suggestions based on his observation of the nature of the injuries suffered.

[96] For the reasons stated above, we are of the view that the learned trial judge was correct in finding that it was the appellant that had caused the death of the deceased.

Second Issue - Whether The Trial Judge Has Erred In Law And In Fact In Arriving At The Decision That The Element Of Intention To Kill Has Been Fulfilled Although Not Proven

[97] In support of this contention, counsel for the appellant has quoted at length from the cases of *Pubalan Peremal v. PP* [2020] 8 CLJ 306; [2020] 5 MLJ 442 and *Tham Kai Yau & Ors v. PP* [1976] CLJU 159; [1976] 1 LNS 159; [1977] 1 MLJ 174 where the Federal Court has dealt comprehensively with the elements of the offence of murder under s. 300 of the Penal Code as well as explaining the important distinction between the provisions of ss. 299 and 300 of the Code.

[98] Counsel argued that:

(i) the trial judge did not at any time make any finding that the appellant had committed any of the elements of s. 300 of the Penal Code. Neither did the trial judge find any of the elements proven in order to convict the appellant of the offence punishable under s. 302 of the Code;

(ii) the trial judge did not specify under which limb of s. 300 of the Code was the offence committed in order to arrive at the conclusion that the appellant had committed an offence under s. 302. Bear in mind, counsel said, that:

(a) PW18's evidence that the appellant's alleged act had caused the death of the deceased was not corroborated by PW6;

(b) PW6 did not testify that the act of the appellant as PW18 had testified was likely to have caused the death of the deceased;

(c) the injury or act of the appellant as PW18 had testified was not corroborated by PW6 to be sufficient in the ordinary course of nature to cause the death of the deceased; and

(d) the injury or act of the appellant as PW18 had testified was not corroborated by PW6 to be so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause the death of the deceased;

(iii) none of the s. 300 elements have been fulfilled by the prosecution as only PW6 could testify and confirm whether the injury that caused the death was likely to cause death or sufficient in the ordinary course of nature to cause death or imminently dangerous that it must in all probability cause death. Instead, PW6 had confirmed that the act of the appellant as described by PW18 (which is denied) would not cause any injury that could cause death.

[99] The thrust of the argument advanced for the appellant in contending that the intention to kill was proven is that the trial judge, according to counsel, did not make any finding that the appellant had committed any of the elements of s. 300 of the Penal Code in order to convict the appellant of the offence punishable under s. 302 of the Code.

[100] It is therefore necessary to consider the provisions of s. 300 of the Penal Code which, encapsulates the definition of murder. The section reads:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

As can be seen from the above definition, murder is an aggravated form of culpable homicide and s. 300(a), (b), (c) and (d) of the Penal Code sets out the four conditions when culpable homicide turns into murder.

[101] In line with the definition given in s. 300, the Court of Appeal in *Sainal Abidin Mading*, (*supra*), has set out in clear terms the ingredients of the offence of murder. As set out at para. [22] *ante*, there are four ingredients of the offence of murder. The fourth ingredient has four limbs to it, *viz*, that in inflicting the injuries upon the deceased, the accused must be proved to have caused them under any one of the four conditions or circumstances prescribed in cls. (a), (b), (c) and (d) of s. 300 of the Penal Code. Notably, the first of the four circumstances (as provided in cl. (a) of s. 300), requires proof that the injuries were inflicted with the intention of causing death.

[102] Now, in setting out the ingredients of the offence charged, the learned trial judge at para. 27 of the GOJ said:

> To succeed; the prosecution needs to prove the following ingredients:
>
> (i) Yohanes anak Vincent had died.
>
> (ii) Yohanes anak Vincent died as a result of the bodily injuries suffered.

(iii) The Accused caused bodily injuries to the deceased and had the intention to kill him.

From the above, the trial judge had in mind the four ingredients of the offence of murder as enunciated in *Sainal Abidin Mading*, (*supra*), namely:

(i) that the deceased had died;

(ii) that death was a result of injuries sustained by the deceased;

(iii) that the injuries of the deceased were caused by or the result of the act of the accused; and

(iv) that the accused had inflicted the injuries upon the deceased with the intention to kill the deceased.

[103] In our considered view, the appellant's argument that there was no finding by the trial judge on which limb or paragraph of s. 300 of the Penal Code was the offence committed, is flawed. This is because, ingredient (iv) as set out at para. [102] *ante*, as identified by the trial judge, is in reality the element or circumstance or condition prescribed in s. 300(a) of the Penal Code. The trial judge may have used the phraseology, "and had the intention to kill him", but this in our view is synonymous or have the same meaning with the words, "with the intention of causing death" as used in s. 300(a) of the Penal Code.

[104] In saying that the phrase "and had the intention to kill him" has the same meaning as, "with the intention of causing death", we draw support from the judgment of Raja Azlan Shah FJ (as HRH then was) in *Tham Kai Yau*, (*supra*), at pp. 176 to 177 (MLJ) in explaining the distinctions between the provisions of ss. 299 and 300 of the Penal Code. His Lordship said:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: **(a) with the intention to cause death**; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that ... the act is likely to cause death.
>
> Section 300, Penal Code defines murder as follows.
>
> Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: **(1) with the intention of causing death**; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing bodily injury to any person, and ... is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

> The words I have italicized show the marked differences between the two offences. **Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply**.
>
> (emphasis added)

Thus, the Federal Court in *Tham Kai Yau*, (*supra*), has used the two phrases interchangeably and ascribed to them the same meaning.

[105] Additionally, we refer to the more recent decision of the Federal Court in *Zulkiple Mohamad v. PP* [2022] 1 CLJ 673; [2022] 1 MLJ 479 which provides a succinct explanation on the 'intention' or '*mens rea*' element of murder under cl. (a) of s. 300 of the Penal Code in these terms:

> [53] The 'intention' or the *mens rea* element of murder under cl. (c) of s. 300 of the Penal Code must not be coalesced with the **'intention' or the *mens rea* element of murder under cl. (a). Under cl. (a), death is the intended consequence and death results as intended**, whereas under cl. (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death.
>
> (emphasis added)

Thus, under cl. (a) of s. 300 of the Penal Code, death is the intended consequence and death resulted as intended.

[106] We therefore disagreed with the contention of counsel for the appellant and found that the learned trial judge had in fact identified and specified the element or condition provided in cl. (a) of s. 300 of the Penal Code, namely, "with the intention to cause death", in other words, "with the intention to kill", as the final ingredient that the prosecution had to prove.

[107] We move on to the appellant's argument that in view that the trial judge did not find any of the elements of s. 300 of the Penal Code proven, he could not proceed to convict the appellant of an offence punishable under s. 302. We observed that this argument is predicated on the erroneous basis that the trial judge had not specified the element of s. 300 upon which the conviction is founded. But as earlier discussed, we are of the considered view that the trial judge had in fact specified the element of, "with the intention to cause death", in other words, "with the intention to kill" as the fourth ingredient to be proved. It is therefore necessary to consider whether the learned trial judge found this element proven.

[108] In this regard, the trial judge said this in his GOJ:

> 37. *This court finds that in the light of the Accused's action of smashing the Deceased's head against the Sofa Chair with considerable force bearing in mind that the Deceased was only 2 months old thus was very fragile and vulnerable. This action of the Accused showed that the Accused intended to kill the Deceased* or at least caused injuries with the knowledge that such smashing of the

A Deceased who is only 2 months ago and very fragile and vulnerable, with violently and considerable force, must in all probability, cause death or such bodily injury likely to cause death of the Deceased.

...

Intention To Kill

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42. *There is clear evidence that the Accused has intention to kill the Deceased on the said fateful night by his word and conduct*. Based on PW18's testimony, the Accused scolded PW18 and intimidated PW18 that he will smash the Deceased's head against the wall until it bled. This is what PW18 said pertaining to the above matter as follows:

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> Suami saya kemudian menengking saya "Dek anang rauh-rauh, enti dek ngai meda anak dek tok di pangka ba dinding ngai ke pambor pala darah anak dek!" yang bermaksud *"Kau jangan nak terjerit-jerit kalau kau tak nak tengok anak ko ni aku hentak kat dinding biar berkecai kepala keluar darah!'*

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43. At that material time, the Accused already held up the Deceased's legs whilst the Deceased's head was at the back of the Accused's body as if he was ready to smash the Deceased's head to the wall. PW18 was shocked and cried loud while asking for his mercy to stop that violence. Then, the Accused put the Deceased on the Sofa Chair again before he sat down.

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44. PW18 then ran towards her room and continue to scream aloud. This caused the Accused to become angrier and again he held up the Deceased's legs with the Deceased's head facing downwards. Then, he smashed (menghempas) the Deceased's body towards the Sofa Chair, violently with no mercy. PW18 heard the loud sound of the impact of the

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Deceased's body hitting the Sofa Chair. After that, she saw that the Deceased's body was still moving and after that he was motionless.

45. *Based on the above events, it clearly showed that the Accused had the intention to kill the Deceased when he uttered such threats of smashing the Deceased to PW18 and the proceeded to slam the Deceased's body onto the Sofa Chair, violently and*

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without mercy. Even after slamming the Deceased against the Sofa Chair, the Accused did not even bother to send the Deceased, for medical attention. PW6 testified that it is possible that the Deceased would have immediately lost consciousness and died a short while later after the trauma.

(emphasis added)

H **[109]** In our view, it is beyond dispute that the trial judge has made a finding of fact at the *prima facie* stage that the appellant by his words and conduct, in first holding the infant behind him upside down by his legs and uttering threats to smash him against the wall until his head is crushed and bleeding and then proceeding to slam the infant into the three-seater settee violently and without mercy, knowing that the infant being two months old and still

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fragile and tender, would definitely be harmed by any violent force, clearly had the intention to kill the deceased, in other words, to cause his death. We have in fact dealt with this point earlier in paras. [30] to [33] above.

[110] We would add here that the evidence is clear that the death of the infant resulted as intended. This follows from the evidence of PW6 that the infant would have immediately lost consciousness and died a short while later after the trauma. The intention to cause death was the more manifest, according to the trial judge, because the appellant did not even bother to seek medical attention for the infant, after he had become motionless upon suffering the violent act.

[111] The principal argument advanced by the appellant in assailing PW18's evidence in this respect is that her evidence of the act and utterances of the appellant was not corroborated by PW6. We have considered this argument earlier. We reiterate that the opinion evidence of PW6 on whether the act of the appellant in smashing the infant into the three-seater settee as PW18 had described, could have caused the fatal head injuries, is inadmissible and irrelevant, and in any event rejected by the trial judge.

[112] With regard to the argument that PW6 did not corroborate the evidence of PW18 that the act committed by the appellant was likely to cause the death of the deceased; sufficient in the ordinary course of nature to cause the death of the deceased and was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death of the deceased, in essence, the appellant is saying that the prosecution must prove all the four limbs or circumstances or conditions provided in cls. (a), (b), (c) and (d) of s. 300 of the Penal Code. This argument is flawed. As explained earlier, the prosecution only needed to prove one of the limbs of s. 300 (see *Sainal Abidin* and *Untung*, (*supra*)).

[113] In the light of the evidence before the trial judge discussed above, we have no reason to disturb his finding of fact that the intention to cause death and death resulted as intended, was proven. Intention, it has been said, is almost always a matter of inference from surrounding circumstances for no one knows what is going on in the mind of another (see *Tham Kai Yau* (MLJ), (*supra*), at p. 176; *Pubalan Peremal* (MLJ), (*supra*), at [15]; *Sainal Abidin Mading* (MLJ), (*supra*), at p. 505.). In the present case, the learned trial judge had the benefit of the *viva-voce* evidence of an eye witness in the form of PW18. In our judgment, based on the facts and circumstances of this case, the learned trial judge was not wrong in drawing the inference of an intention to cause the death of the infant from the words and act of the appellant as described by PW18.

Third Issue - Whether The Learned Trial Judge Has Erred In Law And In Fact In Failing To Consider The Fact That The Appellant And PW18 Were Both Taking Care Of The Deceased

[114] In this respect, the appellant argued that it was either PW18 or the appellant that had caused the death of the infant on 28 April 2016. After the alleged smashing of the infant into the three-seater settee cushion, the appellant had gone to sleep. The infant was with PW18 before the appellant

returned from work that day, hence, it was possible that PW18 could have inflicted the injury that caused his death. PW18 was also a suspect in the case and was arrested. At first instance, she lied to the investigating officer stating that she did not know anything about why the baby had died. Later, she changed her story and pointed the finger at the appellant.

[115] The appellant argued that since only either the appellant or PW18 could have done the act that eventually caused the infant's death, yet they were not jointly charged with common intention to commit the murder of the infant, there is serious doubt as to who caused his death. As such, the prosecution had failed to establish a *prima facie* case and the appellant ought to have been discharged and acquitted.

[116] For this proposition, the appellant cited the case of *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408; [1994] 2 MLJ 576 where the High Court stated as follows:

> Where two or more persons are found in a place where an alleged offence is said to have been committed, and if the evidence as to the commission of the offence does not clearly point to one or to the other, it is said that the guilt of neither has been established. In the case of *R v. Abbot*, 18 Lord Goddard CJ in the Court of Criminal Appeal said at p. 901E-F:
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> > If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case.
>
> This observation of Lord Goddard CJ has been approved and applied by our Supreme Court in *Choo Chang Teik & Anor v. PP*.[13]
>
> Another observation of Lord Goddard CJ in the same case was also applied by the Supreme Court in *Shamsuddin bin Hassan & Anor v. PP*.[19] In that passage, Lord Goddard CJ said at p. 901:
>
> > [Where] two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.
>
> Though the above observations of Lord Goddard CJ and the application of them by the Supreme Court has been in cases where both the persons had been charged and tried, the same principles are equally applicable in a case like the present, were only the first accused is being charged without the other party: see the decision of Mahadev Shankar J in

PP v. Aris. The principles applicable in both the situations are the same: if it is not clearly established whether A or B committed the offence, irrespective of the fact that only A is being charged, then A cannot be found guilty if the evidence does not conclusively indicate his guilt. In fact, this principle applies with greater force in cases dealing with possession. If it cannot be established whether A or B had possession of the offending item, neither A nor B can be found guilty, unless of course, A and B had been jointly charged with a common intention, and if common intention can be established.

[117] For completeness, the High Court in *Muhamad Nasir Shaharuddin*, (*supra*), at p. 598 went on to hold:

In *Shamsuddin v. PP*, where a husband and wife were jointly charged for possession (and trafficking) of drugs found in a parcel thrown out of a car occupied by the accused, Harun Hashim SCJ in acquitting both of them observed at p 497, 'at best the evidence showed that one of the appellants must have had custody and control of the drugs to throw it out of the car. But who?'

His Lordship held that in the absence of evidence as to who exactly threw the parcel out of the car, neither of the accused could be found guilty. He further added at p 498, 'It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.'

[118] The learned trial judge, the appellant argued, has failed to consider that PW18 occupied the same house with the appellant where the incident occurred. One or the other must have committed the offence, but PW18's evidence on what had occurred must be given close scrutiny because she had 'twisted' all her statements during investigation when testifying at the trial.

[119] We do not agree with the above arguments of the appellant. In the first place, the contention that the trial judge has failed to appreciate the evidence that the infant was taken care of jointly by the appellant and PW18 does not make sense. The learned trial judge has set out the prosecution's case in detail at paras 4 to 16 of the GOJ and we have alluded to this at paras. [4] to [18] *ante*. In our considered view, there can be no denying that the learned trial judge was well aware of and appreciated the evidence concerning who was taking care of the deceased at the time of his death. The trial judge was clear that the appellant and PW18 set up home together after their marriage and at the material time, were living at the address stated in the charge with their two-month-old son, the deceased, and the six-year-old son of the appellant from his previous marriage. The trial judge also well appreciated the evidence that when the appellant was at work, as on the day in question, PW18 was the person that took care of the two sons at home.

[120] In the second place, the reliance on the principle laid down in *R v. Abbott* [1955] 2 QB 497; [1955] 2 All ER 899; [1955] 3 WLR 369 and applied in *Muhamad Nasir Shaharuddin* (*supra*); *Choo Chang Teik & Anor v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54; [1991] 3 MLJ 423 and

Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428; [1991] 3 MLJ 314; is misplaced. In all these cases, there was no evidence to establish as to which of the two persons present at the scene of the crime had committed the offence. For that reason, it was said that the guilt of neither has been established. In a case like the present case where only one of the persons present at the scene of crime is charged, the person charged cannot be found guilty if the evidence does not conclusively indicate his guilt.

[121] Unlike in the cases cited above, the learned trial judge in our present case found that there was the direct eyewitness account in the form of the evidence of PW18 which established that the appellant had committed the offence. As earlier explained, the trial judge had accepted the evidence of PW18 that the appellant had violently smashed the three-month-old infant, still tender and fragile, into the three-seater settee cushion thereby causing the severe head injuries leading to his death. The learned trial judge has given his reasons for accepting the evidence of PW18 on this issue as discussed earlier and we find no reason to disturb the trial judge's said assessment of the credibility and acceptance of the evidence of PW18.

[122] We have one final but important point to make in respect of this issue. It is our observation that it was never the appellant's case that he had seen PW18 inflicting harm or injury upon the deceased between the time he arrived home at about 6 or 6.30pm on the day in question until the time that he claimed he went to sleep, which was at 10pm. Neither did the appellant, be it during the prosecution stage when PW18 was being cross-examined or when giving sworn evidence in his defence, put the case that he had seen PW18 inflicting physical harm upon the deceased at any time that evening. Based on his own testimony in court, the deceased was alive when he returned home as he saw his wife feeding the infant with milk. The appellant had even picked up the deceased and put him down again on the sofa as he looked sleepy. Thus, the appellant has confirmed the evidence of PW18 that the infant was still alive when the appellant returned home from work that evening. Now, it will be recalled that PW2 has testified that the time of death of the deceased was less than 24 hours before his arrival at the Bintulu hospital on the morning of 29 April. Crucially, PW6 testified that the deceased would have lost consciousness immediately after the trauma of sustaining the severe head injuries and died moments later. In other words, death would have been nearly instantaneous after the trauma. In our view, if the fatal head injuries were inflicted by PW18 before the appellant returned home from work that day, as the appellant has claimed, the infant would not have still been alive (being fed milk) when the appellant arrived home at about 6.30pm. Further, the infant would have either been unconscious or dead when the appellant purportedly picked him up from the sofa and put him down again. It is inexplicable and inherently improbable that the appellant, by that time, would not have sensed or perceived that the infant

was already dead. This improbable scenario underscores the fallacy of the appellant's case that the fatal head injuries were inflicted by PW18 under her watch and before the appellant returned home that evening.

[123] For the reasons stated above, the appellant's argument that the learned trial judge has failed to appreciate the implication of the appellant and PW18 having jointly cared for the deceased before his death is bereft of reason or merit.

Fourth Issue - Error In Not Considering The Contradictory Statements Of PW18 Which Reflects On Her Credibility And In Not Properly Considering The Defence And Giving The Appellant The Benefit Of The Doubt

[124] PW18, according to the appellant, has made "double statements" which reflected on her character and credibility, but this was not considered by the trial judge. The alleged inconsistencies and contradictions in the testimony of PW18 are:

(i) first, PW18 has told PW3 (Dr Ismail) that there were CCTV cameras in the apartment where she lived and that the incident was recorded on CCTV. PW18 herself changed her story and said that she only knew about the CCTV cameras from the police. There was no evidence, counsel said, that the police told PW18 of the existence of the CCTV cameras. PW3 subsequently found out that no security cameras were installed at the apartment. Even PW3 has agreed, counsel said, that this was an indication that PW18 was not a reliable witness about the information she had provided to him. The appellant, on the other hand, testified that he had never installed CCTV cameras at their apartment;

(ii) second, the appellant, when interviewed by PW19 (the investigating officer) informed the latter that she did not know the cause of death of the deceased as she was asleep. PW18 later changed her story. PW19 attributed PW18's change in story due to being in fear of the appellant but later had the courage to tell the truth. Not true, said the appellant. PW18 has testified in court that she told PW19 that she did not know what happened to the deceased because he did not cry out for milk;

(iii) third, PW18 suspected and told PW19 that their apartment was haunted by evil spirits and there were incidents of running water taps. This was the reason, the appellant said, that PW18 had suggested to bring the deceased to see a 'bomoh'. Counsel for the appellant said that this is proof of PW18's imagination running wild. PW18 has never informed PW3 concerning the fact that the house was haunted. PW3 agreed that if PW18 had given him such information, that would have destroyed her credibility and raised suspicions that she was suffering from some kind of mental disorder; and

A (d) fourth, PW18 claimed to have never attempted suicide, yet admitted that she was jealous of her husband's attention paid to the stepson and once cut her own wrist to gain her husband's attention. If PW18 could self-inflict harm on herself, the appellant said, then the trial judge was not justified in finding that it was the appellant that had inflicted the
B injuries on the deceased.

[125] Further, counsel argued that the learned trial judge was not justified in finding that the evidence of the appellant contained lies, fabrication, bare denial and afterthought. The benefit of the doubt ought to have been given to the appellant because:

C (i) first, the appellant gave evidence on oath, was subjected to cross-examination and remained consistent throughout;

(ii) second, the appellant's evidence at trial was corroborated by the statements he gave in his cautioned statements given on the third
D (exh. D1) and fifth (exh. D2) of May 2016, which was shortly after the incident. There would be gaping holes or contradictions in the court testimony with the cautioned statements if the appellant was lying;

(iii) third, PW18's testimony was contradicted by PW6 yet it was the trial judge's finding that her evidence that the appellant had inflicted the fatal
E injuries was the more credible;

(iv) fourth, the appellant was at work five days a week leaving the care of the deceased to PW18 for most of the day. Thus, it was more probable that the fatal injuries were sustained during her watch; and

F (v) fifth, more consideration must be given to the cautioned statements of the appellant because they were made at the first available opportunity (see *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705). It will be noted that the appellant has repeated substantially the same statements in court.

G **[126]** Therefore, said counsel, the appellant ought to have been discharged and acquitted without being called upon to enter his defence. In any event, the appellant by his defence has raised a reasonable doubt in the case for the prosecution, and ought to have been discharged and acquitted.

Alleged Inconsistent And Contradictory Statements By PW18

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[127] We did not agree with the appellant that the learned trial judge has failed to consider the alleged inconsistencies in the evidence of PW18 and the contradictions between her testimony and that of the appellant. This is what the learned trial judge said in this respect and it shows that he had these matters on his mind:

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> 70. There are obvious contradictions between PW18's and the Accused's testimony on the events which led to the death of the Deceased. In determining which versions of events leading to the death of the

> Deceased on that fateful night, should be accepted, this court having examined the testimonies of both the Accused and PW18 and the evidence adduced, finds that the testimony of Accused is not credible and incapable of being believed as his evidence is not supported by any of prosecution witness. Further, this court finds that the testimony of the Accused contained lies, fabrications, bare denials and afterthoughts.

[128] With regard to PW18 having changed her story concerning her knowledge on how the infant had died, the learned trial judge stated as follows:

> 71. This court finds it is reasonable and acceptable if PW18 did not tell the truth at the first instance when she was asked for the first time by the police about the incident as the incident involved her own husband whom she is afraid of. This matter was been explained by PW19, the Investigating Officer of the case while under re-examination by Prosecution and he said that PW18 at that time was in trauma and was afraid of the accused. She is very worried that she will be physically hurt by the Accused as the Accused is a hot tempered person.

[129] We have no reason to disturb the finding of fact by the trial judge that it was reasonable and acceptable that PW18 had not told the truth at the initial stage of investigation. As PW19 had explained, during the initial investigation, he perceived that PW18 was in trauma and was afraid of the appellant because he was hot-tempered. And that was the reason PW18 did not tell the truth initially. In our view, the acceptance by the trial judge of the evidence of PW19 that PW18 was in fear of the appellant is justified and reasonable because as we have seen, the appellant's paranoid personality disorder drove him to fits of jealousy towards his wife which culminated in the act of violence on the two-month infant causing his death.

[130] In respect of the contention by the appellant that PW18 actually had mental illness demonstrated by her wild imagination in that she claimed that their house was haunted by evil spirits made worse by the fact that she had attempted suicide, the learned trial judge said this:

> 67. The Accused sought to suggest that the injury which led to the death of the Deceased died, was caused by PW18 as the Accused contended that PW18, his wife has wild imagination and claimed that their house was haunted with evil spirits, in order to show that PW18 actually has mental illness ... This court however finds that such contention to be without basis and merits as there is no basis to suggest that PW18 was responsible for the death of the Deceased.
>
> 68. PW17, a physiatrist by the name of Dr Seed Hoon Fei who treated PW18, testified that PW18 is a normal person and she is free from any mental illness. Even though, the defence tried to show that PW18 has mental illness, by alleging that she previously attempted to commit suicide. This was rejected by PW17. In his evidence, he said that the term used is "para suicide" meaning someone actually causing harm to oneself without any intention to die and they might not suffer from any severe mental disorder.

A …

77. Even though, the Accused sought to show that PW18 has mental illness by alleging that she had previously attempted to commit suicide, it was rejected by PW17, who said that the term used is "para suicide" meaning someone actually causing harm to themselves without any
B intention to die, they might not suffer from any severe mental disorder. This opinion also is confirmed by PW18 that she actually have in some occasion self-inflict her hand because she is jealous of the Accused who paid much attention to his son but she did not dare to commit suicide.

[131] We have no reason to disagree with the finding by the learned trial
C judge that PW18 was not suffering from any mental illness whether from having wild imagination or the tendency to commit suicide. This is because his finding was based on the expert opinion of PW17 who had PW18 under observation for about a month. In the psychiatric report exh. P34, PW17 stated that PW18 has no major psychiatric illness and she was of sound mind
D at the time of incident. Under cross-examination by the defence counsel, PW17 confirmed that PW18 did not suffer from any perceptual disturbances or delusions and suicidal thoughts. Reliance on the opinion evidence of PW3 that PW18's credibility was destroyed and raised suspicions that she was suffering from some kind of mental illness if she thought that her house is haunted is misguided, in our view. For one thing, PW3's aforesaid opinion
E evidence on the credibility of PW18 as a witness is irrelevant and inadmissible. For another, his opinion evidence that PW18 may be suffering from some kind of mental illness is also irrelevant because he did not undertake any scientific clinical observation of PW18 to determine her mental state.

F **[132]** As for the CCTV cameras, even if PW18 had given inconsistent evidence on their existence or the source of her belief that they were installed, in our view, it is a minor discrepancy attributable to a lapse in memory rather than being a calculated lie to mislead the trial court. This lapse in memory on a peripheral issue did not destroy her credibility.

G The Cautioned Statements

[133] We find that the learned trial judge had considered the cautioned statements and said:

H 65. PW18 clearly testified that the head injury of the Deceased was caused by the Accused. This court finds that the Accused's reliance on his cautioned statements, marked as Exhibits "D1" and "D2" respectively is without merits as the matters raised in his cautioned statements were not corroborated with evidence from prosecution witnesses. It is normal for a person charged for murder, to deny his involvement in the case.
I Further this court finds that the Accused's said cautioned statements are self-serving and as such this court attaches minimal weight to them.

From the above, it is clear that the learned trial judge had considered the cautioned statements but attached minimal weight to them as he found them to be self-serving and a bare denial of involvement in the murder. To our minds, reliance on the case of *Alcontara*, (*supra*), is misplaced. That case was decided on the basis that it was wrong for the High Court to assume, contrary to the evidence that the appellant's defence was promptly disclosed in his cautioned statement made a day after his arrest, that there had been a belated disclosure of the defence, which suggested concoction. In the present case, the finding by the learned trial judge was not on the basis that there had been a belated disclosure, rather, it was after evaluating the substance of the cautioned statements and finding them to be wanting. We have no reason to disturb such finding of fact.

Insufficient Milk Intake

[134] In this regard, the learned trial judge said:

> 69. As regards the allegation of the Accused that the Deceased was not given sufficient of milk as being the cause of his death, this court finds that there is absolutely no evidence to substantiate such an allegation. The Pathologist, PW6 did not state that the lack of milk was a material factor which caused the death of the Deceased.

We are in complete agreement with the learned trial judge that there is absolutely no evidence to substantiate this allegation. The cause of death, as proven by the evidence of the pathologist (PW6), was due to the severe head injuries inflicted upon the deceased. PW6, as noted by the trial judge, did not state that insufficient milk intake was a material factor in causing the death of the deceased.

[135] We emphasise that in comparison to the Court of Appeal, the learned High Court Judge as the trier of facts, had the audio-visual advantage to assess the testimony of PW18 and the appellant (see Federal Court judgment delivered by Gopal Sri Ram JCA (as he then was) in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203; [2005] 6 MLJ 393, at [25] and *Abd Latif Sakimin v. PP* [2009] MLJU 1828). We are not satisfied that the trial judge had misused the audio-advantage to commit any error of fact in assessing the credibility of PW18 and the appellant on the alleged inconsistencies and contradictions within the meaning explained by Syed Othman FJ (sitting as a HC judge) in *Jayaraman & Ors v. PP* [1981] CLJU 129; [1981] 1 LNS 129; [1982] 2 MLJ 273, at p. 274.

Bare Denial

[136] In respect of the defence advanced by the appellant, the learned trial judge found it to be a bare denial. He stated as follows:

> 61. This court finds that the defence put forward by the Accused was just a bare denial. He denied that there is any no incident of smashing the Deceased's body on the said night in question whilst PW18, his wife said otherwise.

A 62. It is noted that the Accused was the last person seen by PW18, slamming the Deceased's Body on the Sofa Chair violently and without mercy. This court finds that PW18 is a witness of truth as she able to testify in details, the whole incident even though her evidence would implicated his own husband, the Accused. PW18's testimony was unshaken while she is under cross-examination by the defence.

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63. The Accused himself admitted while under cross-examination by the Prosecution that as the Deceased at that time, was only 2 months old and if any violence force is applied to the Deceased, it would definitely harm the Deceased as his head and body was still soft and fragile.

C 64. As testified by PW6, the Pathologist, the Deceased died from the severe head injuries probably from the head knocked onto, or hit or struck or thrown from a height on to the floor or a blunt surface or a wide surface blunt object. It is possible that the Deceased would have immediately lost consciousness and died a short while later after the trauma.

D 66. This court is guided by *Public Prosecutor v. Ling Tee Huah* [1982] 2 MLJ 324, where the court held that:

> ... **A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient** ...
>
> See *Yap Fook Yew & Anor v. PP* (1949) MUJ Supp 3.

E

(emphasis added)

[137] In our view, the learned trial judge was correct in finding that the defence of the appellant is a mere bare denial of the incident described by PW18 of him having uttered the threats of smashing the infant against the F wall until he bled and then making good on those threats by violently smashing the infant into the three-seater settee, thereby causing his near instantaneous death. In so denying, the appellant asserted that the fatal head injuries must have been inflicted by PW18 because (i) she had mental illness, (ii) she gave inconsistent and contradictory statements, and (iii) the deceased G was in her care and under her watch for most of the days. For the reasons stated above, the trial judge, in our judgment was correct in finding that these assertions were not credible and insufficient to raise a reasonable doubt in PW18's narrative that the appellant had intentionally caused the death of the deceased.

H **[138]** We repeat our earlier observation that it was never the appellant's case that he had seen PW18 or his young son for that matter, inflicting harm or injury upon the deceased from the time he arrived home at 6.30pm that evening until 10pm that night. Instead, the appellant was resolute in advancing his case that the fatal head injuries must have been inflicted by I PW18 because the deceased was in her care and under her watch for most of the days as the appellant was at work. As pointed out earlier, the appellant had overlooked the crucial testimony of PW6 that the deceased would have

lost consciousness immediately after the trauma and died soon afterwards. This piece of evidence underscored the fallacy of the appellant's case because if PW18 had inflicted the fatal injuries upon the infant that day whilst the appellant was at work, then it is inexplicable and inherently improbable that the infant was still alive, (being fed milk as the appellant had testified), when the appellant arrived home at 6.30pm that evening. He was alive still when the appellant purportedly picked him up from the sofa after his feed. This improbable scenario undermines the appellant's denial that he had with the intention to cause death, inflicted the fatal head injuries upon the infant between 7 to 10pm that evening as PW18 had testified.

Conclusion

[139] In conclusion, in the light of the foregoing analysis and reasons, we found upon the totality of the evidence, that the conviction of the appellant is safe. The learned trial judge had considered and appreciated all of the evidence before him in finding that the appellant had failed to raise any reasonable doubt as to his guilt. He was thus correct in concluding that the prosecution had proved its case beyond reasonable doubt and the appellant guilty as charged for an offence under s. 302 of the Penal Code. There being no appealable error warranting appellate intervention, we unanimously dismissed the appeal and affirmed the appellant's conviction and sentence of death as pronounced by the High Court.